

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MORPHO KOMODO, LLC

DOCKET NO. 5:15CV1100

VS.

MAY 18, 2016

9:06 A.M.

BLU PRODUCTS, INC, ET AL

MARSHALL, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 49

REPORTER'S TRANSCRIPT OF CLAIM CONSTRUCTION HEARING

BEFORE THE HONORABLE ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

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5

6 PROCEEDINGS REPORTED USING COMPUTERIZED STENOTYPE;
7 TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.
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"WHEREIN" CLAUSES

35

"WHEREIN SAID RECORDING COMPRISES A PLURALITY
OF USER-SELECTED DEVICES"

42

1 (OPEN COURT, ALL PARTIES PRESENT)

2 THE COURT: For the record, we're here for the
3 Claim Construction Hearing in *Morpho Komodo versus BLU*
4 *Products, et al*, Case No. 2:15-1100 on our docket.

09:06AM

5 Would counsel state their appearances for the
6 record.

7 MR. NI: Good morning, your Honor. Hao Ni for
8 the plaintiff Morpho Komodo, LLC.

9 THE COURT: All right. Thank you, Mr. Ni.

09:06AM

10 MR. DIETRICH: Good morning, your Honor.
11 Blake Dietrich on behalf of PCS Wireless, LLC.

12 MR. EGOZI: Good morning, your Honor. Bernard
13 Egozi on behalf of BLU Products, Inc.

14 THE COURT: All right. Thank you,
15 Mr. Dietrich and Mr. Egozi.

09:06AM

16 I'll state for the record that earlier this
17 morning we distributed to counsel a set of preliminary
18 constructions. The purpose of those constructions is to
19 let counsel know where the court is after the initial
20 review of the pleadings in the record. The preliminary
21 construction is not intended to dissuade either side from
22 arguing for whatever positions counsel think are
23 appropriate. Rather, it's designed to allow you to focus
24 your arguments and your time where you think the court
25 may have most gone astray. I do reserve the right to

09:07AM

09:07AM

1 alter these constructions and not uncommonly do alter the
2 preliminary constructions based on the arguments received
3 at the hearing. So, I hope that the parties will accept
4 them in that spirit.

09:08AM

5 Let me also say that I'm happy to take these
6 terms up in whatever order counsel think is most
7 efficient, but I would like to have the argument on a
8 term-by-term basis.

9 And with that, I'll turn it over to counsel.

09:08AM

10 MR. NI: Thank you, your Honor.

11 We had discussed with defendants' counsel, I
12 believe they were going to take some of the terms first.
13 We are not going to have any arguments on the term "input
14 device," and we are narrowing the argument on the term
15 "signature" to just the additional limitation of
16 "unauthorized access to a computer" that defendants were
17 asking for.

09:08AM

18 THE COURT: All right. And I -- also -- that
19 reminds me. I want to point out that the preliminary
20 construction on "computer," in addition to plain and
21 ordinary, should have included a notation that the court
22 intends at this point to reject the defendants' proposed
23 limitation to laptop and desktop computers. So, that --
24 I'll tell you that as well for the purpose of your

09:09AM

09:09AM

25 argument.

1 But that's fine, and we can proceed in any
2 order that counsel wants to. If you want to turn it over
3 to counsel for defendants first, that's fine.

4 Mr. Dietrich.

09:09AM

5 MR. DIETRICH: Yes, your Honor. And the
6 parties would thank the court for these preliminary
7 constructions. Obviously they have helped in narrowing
8 some of the disputes already.

09:09AM

9 One particular point I'd like to draw out just
10 before we get into some of these more disputed terms is I
11 believe the parties have reached some form of an
12 agreement with respect to "signal," so long as both
13 parties are capable of sort of making a clarification or
14 asking the court for some additional guidance with
15 respect to the notation.

09:10AM

16 In particular, I believe defendants' position
17 is that this reading would preclude any further argument
18 that a signal can come from multiple transmissions. It
19 would simply be the equivalent of stating that a signal
20 comes from a single transmission. I understand that the
21 court has not used that language as defendants have
22 proposed. However, subject to that clarification, I
23 believe defendants --

09:10AM

09:10AM

24 THE COURT: The main reason not to use the
25 language is the -- as you pointed out in your briefing, I

1 think both sides recognize that the specification and the
2 claims use "transmission" in a way that is not perhaps
3 the most natural way; and, so, injecting that term into
4 the construction I think is counterproductive.

09:11AM

5 MR. DIETRICH: Okay. Well, then --

6 THE COURT: But that is the -- your
7 understanding of the meaning of this construction is
8 correct.

09:11AM

9 MR. DIETRICH: Well, and perhaps so long as we
10 can get affirmation from plaintiff's counsel that they
11 intend to honor that distinction and not argue that
12 "signal" can be broadcast on multiple transmissions, I
13 think we can accept that, your Honor.

09:11AM

14 THE COURT: Okay. This language and the full
15 reasoning will be in the claim construction order so --
16 and our intent is that the claim construction order will
17 govern the experts and the parties in their future
18 positions. So, this would be a part of the construction
19 even though it's not in the language that we're proposing
20 be given to the jury.

09:12AM

21 MR. DIETRICH: Yes, your Honor.

22 THE COURT: But that's fine.

23 Mr. Ni, is that consistent with your
24 understanding?

09:12AM

25 MR. NI: Yes. Thank you, your Honor. Yeah,

1 that's consistent. We would agree that in expert reports
2 our expert wouldn't take the position that a single
3 signal can be communicated via multiple transmissions.

09:12AM

4 THE COURT: Okay. All right. We will note
5 that agreement.

6 MR. DIETRICH: Your Honor, I believe for the
7 rest of the hearing it might make sense just to go down
8 this list of terms from top to bottom.

9 THE COURT: That's fine.

09:12AM

10 MR. DIETRICH: So, with respect to
11 "computer" --

12 I'm sorry. Ms. Andrews, would you mind --
13 thank you very much.

09:13AM

14 So, with respect to "computer," this slide
15 illustrates the parties' respective positions.
16 Plaintiffs have proposed that the construction be limited
17 to "a laptop or desktop computer." Essentially this
18 dispute seems to boil down to whether a computer includes
19 handheld devices or other embedded devices.

09:13AM

20 Defendants' position is that a computer does
21 not include handheld devices, and that is predicated not
22 only on the specification's differentiation between
23 computers and computer-like handheld devices but also
24 based on claim differentiation based on a reading of the
09:13AM 25 '415 patent's claims.

09:14AM

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09:15AM

09:15AM

1 So, in particular, with respect to the
2 specification, the specification explicitly discloses
3 here that Figure 1 is a block diagram of a desktop
4 computer which comprises a number of elements. Moving
5 down to that same passage, just a few lines later the
6 specification describes that "The described software may
7 be employed on such a computer 100," i.e., drawing to
8 that same referential number. "As well, the software
9 described may find application in other computer-like
10 devices requiring secured access, including handheld
11 devices or embedded devices."

12 Your Honor, defendants' position is that by
13 indicating that handheld devices and embedded devices are
14 computer-like, the patent owner here has stated that they
15 are not in fact computers. So, if I were to describe
16 quail as having a chicken-like texture, I don't think
17 anyone would reasonably consider my statement to mean
18 that chicken and quail are the same thing or that quail
19 is a subset of chicken. They have similar
20 qualifications, but they are in fact different things.

21 THE COURT: But isn't it just as consistent to
22 read this language as saying that computer-like devices
23 may include devices that are handheld or embedded, as
24 opposed to saying that no handheld device or embedded
25 device is a computer?

1 MR. DIETRICH: I think the positions are
2 distinguishable, your Honor, simply -- not just based on
3 this language but also as we proceed to the next argument
4 with respect to claim differentiation. So,
09:15AM 5 independently, yes, I would tend to agree that one could
6 make the argument that handheld devices and desktop
7 computers such as the one described in Figure 1 have
8 similar qualifications. They might have identical
9 components. However, they are distinct things, as
09:16AM 10 embodied or shown by that "computer-like" qualification.
11 So, while they may have similar components, they are in
12 fact distinct objects, as the patent owner considered
13 them to be.

14 THE COURT: Do you agree that a computer can
09:16AM 15 be handheld?

16 MR. DIETRICH: I believe a laptop computer is
17 certainly handheld, your Honor.

18 THE COURT: Are there other computers that can
19 be handheld?

09:16AM 20 MR. DIETRICH: There may in fact, but I don't
21 think as considered by the patent owner here that that
22 was the qualification. So, a computer could be made
23 significantly smaller; however, as qualified here,
24 handheld devices are not particularly just small
09:16AM 25 computers. They are a separate qualification of

1 computer-like devices which fall under the general
2 category of "computing devices." So, I think the '415
3 patent really draws on this distinction.

4 THE COURT: All right.

09:17AM

5 MR. DIETRICH: So, looking at the '415 patent,
6 we have four claims. We have independent claim 1 and
7 then three dependent claims which depend therefrom. So,
8 independent claim 1 claims "a computing device which
9 provides secured access, the computing device
10 comprising"; and then there's a number of components
11 recited thereafter.

09:17AM

12 Dependent claim 2 specifically states that
13 that computer device comprises a computer.

09:17AM

14 So, what we have effectively is we have the
15 beginning of an inverse triangle definition whereby
16 "computing device" is getting narrowed. So, we're honing
17 in to the specific geniuses within the larger family of
18 computing devices.

09:17AM

19 Dependent claim 3 really brings this home. It
20 says that the computer further comprises a desktop
21 computer.

09:18AM

22 Most tellingly, however, dependent claim 4
23 does not claim dependency based on dependent claim 2
24 which is the qualification that the computing device is a
25 computer. It very easily could, as shown by dependent

1 claim 3. However, it goes back all the way to the top,
2 the family. It says that the computing device comprises
3 a handheld computing device.

09:18AM

4 I believe by making this distinction we can
5 draw the subsequent diagram which plaintiffs [sic] have
6 prepared. In this diagram we show that the larger
7 family, this computing device, is represented by
8 independent claim 1. Within this larger family we have
9 dependent claim 2 which shows that the computing device
10 further comprises a computer.

09:18AM

11 I believe my clicker is not appearing on the
12 screen, but I believe your Honor can see the yellow
13 depiction on the screen.

14 THE COURT: Yes.

09:18AM

15 MR. DIETRICH: Within dependent claim 2,
16 within the definition of "computer," we have "desktop
17 computers."

09:19AM

18 However, then we start over again with
19 dependent claim 4 and say that computing devices comprise
20 handheld computing devices.

09:19AM

21 I believe drawing upon the distinction in the
22 specification as well as the claim differentiation shown
23 in the dependent claims of the '415 patent, there's clear
24 evidence here that the patent owner considered computers
25 and computing-like handheld devices -- computer-like

1 handheld computing devices to be distinct objects. So,
2 while there may be some overlap -- i.e., they fall within
3 the same family -- they are in fact distinct objects.

09:19AM

4 THE COURT: Tell me how it's inconsistent with
5 claim differentiation for a handheld device to also be a
6 computer.

09:20AM

7 MR. DIETRICH: Well, your Honor, I think the
8 distinction that the defendants are trying to draw upon
9 is why would -- if -- knowing proper claim construction
10 strategy -- i.e., that a dependent claim is claiming to a
11 secondary dependent claim -- in the preceding claim --
12 so, dependent claim 3 immediately preceding dependent
13 claim 4 draws on that very point which is that a computer
14 includes specific types of computers, i.e., a desktop
15 computer. However, the patent owner explicitly decided
16 not to take that same tactic when it came to handheld
17 devices or handheld computing devices. And I believe
18 that distinction, as the doctrine of claim
19 differentiation will show, is important. It is of some
20 importance in this consideration.

09:20AM

21 THE COURT: You're arguing that the patentee
22 could have drafted his claims differently. I understand
23 that. But I don't think there's any doctrine that
24 requires that the court read claim 4 as relating in any
25 particular way to the other dependent claims that it

09:21AM

1 doesn't reference.

2 MR. DIETRICH: I understand, your Honor; and I
3 believe -- I believe the argument could be made that they
4 have the same components or that they have very similar
09:21AM 5 characteristics, which is why they are computer-like and
6 why they fall within this same general family.

7 However, I believe the case cited by
8 defendants in their brief, which is *Tandon Corp. v. U.S.*
9 *International Trade Commission*, states that (reading) to
09:21AM 10 the extent that the absence of such a difference in
11 meaning and scope would make a claim superfluous, the
12 claim of -- the doctrine of claim differentiation states
13 that the presumption that the difference between claims
14 is significant.

09:22AM 15 So, I believe using that distinction, if
16 handheld computer device is no different than a computer
17 or falls within the same penumbra, why then not claim
18 that same distinction -- that same dependency that
19 dependent claim 3 relies upon.

09:22AM 20 THE COURT: Well, why isn't this just as
21 consistent that computing device is broader than computer
22 but that a handheld device can be either a computing -- a
23 handheld computing device or a handheld computer, that
24 either a computer or a computing device can be handheld?

09:22AM 25 How is there anything in the specification or the claims

1 that excludes that?

2 MR. DIETRICH: Well, again, your Honor, I
3 think the most pertinent evidence is the patent owner's
4 own words that handheld devices are computer-like.

09:23AM

5 THE COURT: All right. I just disagree that
6 he said handheld devices are computer-like. He just said
7 that computer-like devices may include handheld devices,
8 not all handheld devices but handheld devices. You're
9 wanting me to read it as all handheld devices are

09:23AM

10 computer-like. I mean, he could have said like all kinds
11 of other subsets, like battery-operated or like anything
12 else. He didn't say -- I don't read anything in that to
13 say that all handheld devices are computer-like. And
14 that's what I'm missing to accept your argument.

09:24AM

15 MR. DIETRICH: Yes, your Honor.

16 I think -- it appears that the court
17 understands defendants' position here.

18 THE COURT: All right.

19 MR. DIETRICH: To the extent that there's a
20 disagreement --

09:24AM

21 THE COURT: I'm not trying to get you to
22 abandon your position. I understand that.

23 MR. DIETRICH: No, sir. But I think one
24 qualification I will make is that defendants acknowledge
25 in their briefing that computers might be broader than

09:24AM

1 desktop or laptop computers, and it's not our attempt to
2 unnecessarily limit here. So, I think -- I think
3 defendants would be willing to concede to a plain and
4 ordinary meaning with the qualification that handheld
5 devices -- handheld or embedded devices are computer-like
6 devices as opposed to falling specifically within that
7 "computer" definition.

09:24AM

8 THE COURT: All right. I do understand that,
9 but I believe that handheld devices cross both computer
10 and computer-like devices. I think if I was going to use
11 your Venn diagrams I would have the green diagram you
12 have for handheld computing device overlap with the
13 orange circle you have for computers. But I understand
14 your argument.

09:25AM

15 MR. DIETRICH: Yes, your Honor. Unless the
16 court has any additional questions, I believe...

09:25AM

17 THE COURT: I don't on that point.

18 Mr. Egozi, do you want to be heard separately
19 on that?

09:25AM

20 MR. EGOZI: I would just add -- do you want me
21 to approach the lectern?

22 THE COURT: Yeah. If you want to, go ahead.
23 And then I'll let Mr. Ni respond.

24 MR. EGOZI: I would only add, your Honor, that
25 there are some handheld devices that do no computing

09:26AM

09:26AM

1 whatsoever. For instance, BLU has a large line of
2 handheld devices that are simply called "feature phones"
3 or "feature devices" which simply allow somebody to make
4 a telephone call or to send a text and nothing else and
5 no computing is allowed. That's all I would add, your
6 Honor.

09:26AM

7 THE COURT: And the little green circle is not
8 all handheld devices. It's just handheld computing
9 devices. But I agree that if it was just handheld
10 devices, it would go outside the blue circle as well as
11 inside the yellow circle. So, I -- but I understand your
12 point.

13 MR. EGOZI: Thank you, your Honor.

14 THE COURT: Thank you.

09:26AM

15 MR. NI: Thank you, your Honor.

16 Plaintiff doesn't really have that much more
17 to add to the court's construction for the term
18 "computer." And we agree with the way the court would
19 have drawn the Venn diagram as well.

09:26AM

20 And in particular, you know, defendants'
21 argument on the '415, as the court articulated, it's not
22 a, you know, if -- if one is more limiting than the other
23 and one is limiting that one. Something else that's
24 limited to computing device is not limited to a more
25 narrow category or excluded from that category because it

09:27AM

1 wasn't claimed that way.

2 Don't have any additional comments for this
3 term unless the court has any questions.

09:27AM

4 THE COURT: All right. I don't have any
5 questions, Mr. Ni.

09:27AM

6 And I guess there was one other question,
7 Mr. Dietrich, that I wanted to ask; and that is I didn't
8 get the impression from the briefing that there was any
9 other dispute as to the meaning of "computer." I got the
10 understanding that it was really all about the arguments
11 that you presented about whether handheld devices would
12 be excluded.

09:27AM

13 MR. DIETRICH: I believe that's correct, your
14 Honor; and I believe that goes to defendants' point which
15 is that I believe we can adopt a plain and ordinary
16 meaning. However, defendants would still respectfully
17 show that handheld computing devices and embedded devices
18 do not fall within that plain and ordinary meaning.

09:28AM

19 THE COURT: Okay. I understand your position,
20 and I just wanted to get that on the record before we
21 moved off of "computer."

22 MR. DIETRICH: Yes, your Honor.

23 THE COURT: All right. Thank you,
24 Mr. Dietrich.

09:28AM

25 MR. DIETRICH: So, your Honor, with respect to

1 the next disputed term -- I believe we can skip "signal."
2 We've already addressed that term.

3 The next disputed term would be "measurable
4 variable input." Again, the court has previously
09:28AM 5 construed this term in what I'll deem the TIB order. I
6 don't believe defendants' position is that that
7 construction was wrong or that it was erroneous. I
8 believe that what needs to be done to honor that, the
9 true intended function or the true intended meaning of
09:29AM 10 that construction, is to add two small variations to that
11 construction.

12 In particular, I believe the key disputes here
13 are whether a measurable variable input must gradually
14 vary and then, second, whether other inputs -- i.e.,
09:29AM 15 nonmeasurable variable inputs -- are distinctly or
16 discretely identifiable.

17 So, with respect to this discussion, I believe
18 it bears a general discussion of the background of these
19 patents. So, the specifications describe historic
09:29AM 20 methods of verifying and authenticating signatures. In
21 particular, the patents discuss character-based passwords
22 which were subject to absolute variation. Either you
23 typed in the password correctly or you didn't. There's
24 no middle ground. It's either yes 100 percent correct or
09:30AM 25 no zero percent correct, no authentication.

1 In contrast, the specifications also describe
2 these measurable variable inputs which require some
3 tolerance for validation. These are more difficult to
4 exactly replicate. For example, a mouse movement,
09:30AM 5 drawing a square, one wouldn't be expected to exactly
6 draw the exact same square.

7 Now, although these character-based passwords
8 and measurable variable inputs are both capable of
9 varying, it's that type of variance that the court drew
09:30AM 10 on and that is really at the crux of this invention.

11 In particular, with respect to character-based
12 passwords, we've discussed it's an absolute yes or no.
13 There is no middle ground. You can't get close to typing
14 your password and then fall within some tolerance. It is
09:30AM 15 either you 100 percent did it or you didn't. With
16 respect to the character -- or to the more volatile
17 measurable variable inputs, the gradual variance, the
18 small, minute differences that are not exactly the same
19 but fall within that tolerance are acceptable; and that's
09:31AM 20 what the patents really describe here. And I believe
21 that's what the court was drawing upon with its earlier
22 distinction.

23 However, I don't believe plaintiff's
24 application of the court's earlier construction is
09:31AM 25 correct; and I believe that's why defendants are asking

1 for additional clarification as to the gradual variance.

2 In particular -- and these two points are
3 fairly intimately tied. Plaintiffs are drawing on a
4 construction to show that certain keystrokes and the
09:32AM 5 timing between those keystrokes are both measurable and
6 variable inputs, and that comes directly from the
7 briefing on this subject.

8 Ms. Andrews, can I go to the -- thank you very
9 much.

09:32AM 10 So, in particular, we have here -- I've
11 highlighted it on the screen. It's -- this is directly
12 from the briefing. It says, "The specification discloses
13 various examples of measurable signals. In a keyboard,
14 for example, typing a word may yield signals for the
09:32AM 15 entered keys and the timing between keystrokes. In that
16 case, the keys and timing between the keystrokes are both
17 'measurable' because they can be measured and converted
18 into signals."

19 I'll go now to the TIB order.

09:33AM 20 THE COURT: Is your concern that the
21 plaintiffs are arguing that a mere password can be a
22 measurable variable input?

23 MR. DIETRICH: Well, our key concern, your
24 Honor, is that variance -- just simply stating that the
09:33AM 25 measurable variable input can vary is not necessarily

1 enough to distinguish between nonmeasurable variable
2 inputs. So, the variance is not simply the ability to
3 vary. It's the ability to vary without a finite amount
4 of limitations.

09:33AM

5 So, in the TIB order here, we have the court
6 explicitly saying that (reading) the significance of
7 being measurable is evident from the above-quoted portion
8 of the background which discloses that measured
9 characteristics are different from distinctly

09:34AM

10 identifiable inputs such as key characters.

11 Well, again we go back to plaintiff's opening
12 brief and they've failed to acknowledge and they've
13 failed to adhere to that distinction. They've in fact
14 said that key characters, keystrokes, are measured

09:34AM

15 characteristics.

16 And again, I believe the point to be made is
17 that measurable variable inputs can gradually vary. They
18 have the ability to fall within a range of tolerance and
19 be accepted, whereas keystrokes -- so, for example,

09:34AM

20 looking at the letters J and K on your keyboard, you
21 can't type something in between those two characters.
22 You can either type J and K, you could type J or K, or
23 you could type neither. In either event, there are
24 discrete values for those terms -- they're not

09:35AM

25 measured -- whereas a mouse movement, timing, these sorts

1 of measurable variable inputs, do not have those same
2 discrete identification.

3 In fact, defendants would suggest that really
4 any difference can be a distinct difference or a distinct
09:35AM 5 identification. However, that discrete value is really
6 what separates measurable variable inputs from other
7 nonmeasurable variable inputs.

8 THE COURT: All right. I know there are two
9 separate arguments here; and I follow your first
09:35AM 10 argument, I believe. The difference between "distinct"
11 and "discrete" I'm not sure I follow.

12 MR. DIETRICH: Okay. Ms. Andrews, if we could
13 go back to the slides, if you would.

14 Again -- and I apologize. I think the easiest
09:35AM 15 argument -- or the easiest example I can think of is,
16 again, a keystroke. So, the letter J on your keyboard.
17 It has value as the letter J, but that is how it is
18 distinctly identifiable. However, the court has said --
19 I apologize. Let me backtrack here for just one second.

09:36AM 20 So, the letter P, as we've shown here, is
21 either pressed or it is not. It has a discrete value as
22 either 1 being pressed or 0 not being pressed. There's
23 no middle ground in there. Those are distinct values;
24 however, they are also discrete values.

09:36AM 25 Whereas you look at a mouse movement, for

1 example, moving a mouse, if you're slightly different, it
2 would still have a distinct identification. It would be
3 different. It would be a measurable difference.

09:36AM

4 However, the point to be made is that that mouse movement
5 can fall within an infinite series of variations.

6 There's no discrete values. It's not 1 or 0. It is
7 anywhere between 0 and 1 or any infinite range of values.

8 And I believe we're not -- or defendants are
9 not trying to inject some hypertechnical, sophisticated

09:37AM

10 engineering value or computer science specific value
11 here. What we are trying to show is that the types of
12 characteristics that were not measurable variable are
13 limited to discrete values. Either J is pressed or it's
14 not. Either K is pressed or it's not. You can't have

09:37AM

15 something in the middle. Those are discrete values. And
16 I believe that distinction is more in line with what the
17 patent owner had in mind when drafting these claims and
18 what the previous -- the court decided in the previous
19 order.

09:37AM

20 THE COURT: Well, I guess part of my concern
21 about your proposal is that it injects terms that
22 themselves are unclear, such as "gradually" and
23 "discrete." I -- I mean, you in your proposed
24 construction offer by footnote a construction of

09:38AM

25 "gradually"; and the distinction you're making between

1 "distinctly" and "discretely" is certainly a fine -- by
2 that I mean a difficult distinction.

3 And I'm thinking it's easier perhaps to
4 approach this by ruling out what you're concerned about
09:38AM 5 as opposed to trying to define it in. Is there something
6 other than a typed password that you're concerned the
7 plaintiff is trying to include in the meaning of this
8 term?

9 MR. DIETRICH: I believe that's our primary
09:39AM 10 concern. Counsel for BLU might have additional points to
11 be made on this, but I believe the key distinction here
12 is that distinct values are keystrokes or typed
13 passwords, whereas measurable variable inputs explicitly
14 do not include those, those types of inputs. And what I
09:39AM 15 would like to just stress is that based on plaintiff's
16 opening brief, it appears that that distinction doesn't
17 carry the same merit as it was intended to based on the
18 court's previous order. And I believe that is all
19 defendants are trying to emphasize in this construction.

09:40AM 20 THE COURT: And I will try and draw that out
21 when I'm hearing from Mr. Ni.

22 One thing that concerns me about your argument
23 was in the brief at -- I guess it's page 14 of your
24 brief. When you're talking about this "gradually"
09:40AM 25 limitation, you say "However, measurable characteristics

1 described in the specification can, and often do, vary
2 gradually."

3 How can we build into the construction
4 something that you say is just "often" present?

09:40AM

5 MR. DIETRICH: Well, I believe, your Honor,
6 what we're doing is we're saying that they can -- I
7 believe the proposed construction -- and I will pull it
8 up right now. Defendants' proposed construction is "an
9 input quantity that can gradually vary." So, we're not
10 saying that it must gradually vary. It's simply the
11 ability to gradually vary. And I believe that's in line
12 with what the patents state, wherein these are difficult
13 to exactly replicate. You could theoretically. I mean,
14 it's the odds of drawing a perfect circle freehand.

09:41AM

15 Right? I mean, theoretically it is possible. However,
16 it's unlikely. So, to the extent that you do it once,
17 you might not be expected to exactly replicate it. And
18 it's that gradual variance which I feel is -- was
19 appreciated by the court in the previous order. However,
20 defendants feel that it might be subject to exploitation
21 because without that qualification that it's gradual
22 variance, the word "vary" by itself doesn't necessarily
23 suffice.

09:41AM

09:42AM

24 THE COURT: Okay. All right. Thank you for
25 your argument, Mr. Dietrich.

1 Mr. Egozi, do you want to offer anything on
2 that term before we hear from plaintiff?

3 MR. EGOZI: No, your Honor.

4 THE COURT: Okay.

09:42AM

5 MR. NI: Thank you, your Honor. You know, we
6 appreciate the court's preliminary construction on this.
7 We, you know, agree with the construction on it. I'm
8 again unclear as to, you know, what defendants are saying
9 with the "gradually varying."

09:42AM

10 Defendants' counsel argued that -- you know,
11 in their footnote they're basically saying that the
12 measurable variable input can gradually vary but doesn't
13 have to. So, if they're making the argument that it can
14 do something but doesn't have to, I don't understand why
15 we would insert the limitation in the construction for
16 the term.

09:42AM

17 THE COURT: Well, you in your brief do refer
18 to passwords in effect, typing a word, as one possible
19 measurable variable input.

09:43AM

20 MR. NI: So, I can clarify what we meant in
21 our briefing by that. So, we're not saying that the
22 actual password itself is a variable -- is a measurable
23 variable input. The password is the password. It's
24 either the correct password or incorrect password. The
25 specification provides an example where the timing

09:43AM

09:43AM

1 between the keystrokes could be a measurable variable
2 input. For example, if I was to enter, you know, the
3 password "court" and I had paused certain periods between
4 the entering of keystrokes and those were outside of the
5 allotted parameters, that would be a measurable variable
6 input. The password itself we're not saying has anything
7 other than being a distinct value.

8 THE COURT: All right. I think that's a
9 helpful clarification.

09:44AM

10 MR. NI: And other than that, I -- you know,
11 we agree with the court that "discrete" does not add
12 anything additional to what's distinctly identifiable.
13 As the prior claim construction order pointed out, it's
14 always been distinguished what is measurably variable and
15 what is distinctly identifiable. So, those separations
16 are already clear. So, adding "discrete" to it doesn't
17 really help, you know, the construction at all for that
18 term.

09:44AM

19 THE COURT: All right.

09:44AM

20 MR. NI: Thank you, your Honor.

21 THE COURT: Thank you, Mr. Ni.

22 Mr. Dietrich, if you want to respond, go
23 ahead.

09:44AM

24 MR. DIETRICH: Yes, your Honor. And just very
25 briefly.

1 I appreciate plaintiff's clarification on this
2 point. However, I don't believe it's in line with what
3 they've shown in their briefing. With respect to
4 briefing -- and again I can throw it on the Elmo to the
09:45AM 5 extent it would be helpful. But they specifically say
6 that keystrokes are measurable signals, and then in the
7 very next sentence they say the keys and timing between
8 keystrokes are also variable because different characters
9 may be used. So, to the extent that this was not what is
09:45AM 10 intended, it is what is stated in their briefing; and I
11 think under this construction it's reasonable to exploit
12 this current formation.

13 THE COURT: As long as the court's opinion
14 notes that a -- a password being a series of keyboard
09:45AM 15 strokes is not in itself a measurable variable input,
16 what other issue would you have?

17 MR. DIETRICH: At this time, your Honor, I
18 can't think of anything. So, I would leave it to the
19 court.

09:45AM 20 THE COURT: Okay. Thank you. I understand
21 the dispute. I appreciate it.

22 MR. DIETRICH: The next term, your Honor -- I
23 should say the next term that comes up would be
24 "signature." As the parties have said, I believe the
09:46AM 25 parties are willing to agree to the beginning of the

1 proposed construction here, which is "at least one
2 transmission intended as" versus defendants' "a
3 transmission intended as." However, defendants' position
4 with respect to the "unauthorized access" to a computer
09:46AM 5 would still be subject to dispute.

6 So, defendants feel that the patents in
7 general are very clear that signatures are utilized to
8 prevent unauthorized access to computers; and defendants
9 feel that we have a wealth of evidence on our side here.

09:47AM 10 For example, the title of the '078 patent, the primary
11 parent patent of all of these patents, is "User Selection
12 of Computer Login." The abstract goes on to state
13 "Computer login may comprise any user-determined
14 submission." Further, the patent goes on to describe
09:47AM 15 "Computer login traditionally consists of a user typing
16 in an account name."

17 Plaintiffs cannot and don't necessarily even
18 try to identify another noncomputer embodiment for the
19 asserted patents in their briefing. Instead, plaintiff
09:47AM 20 actually goes on to acknowledge that each of these
21 patents is pertaining to the field of computer login by
22 user-determined submission. This is not to say computer
23 and other access -- it's computer login by
24 user-determined submission.

09:48AM 25 This understanding is further confirmed by the

1 claim language. So, here we have the '078 patent, again
2 the first claim of the primary patent here, "A
3 computer-implemented method for creating a signature for
4 subsequent authentication."

09:48AM

5 Plaintiff's briefing, they go on to describe
6 that "a signature is created for subsequent
7 authentication." The patents describe this
8 authentication process as receiving a submission,
9 validating, and then providing authorization.

09:48AM

10 The asserted patents then specifically
11 describe the purpose of that authentication which is
12 "Submission comprises one or more transmissions intended
13 for authenticating access to a computer or network of
14 computers."

09:48AM

15 I believe defendants have made clear in their
16 briefing that by limiting to "a computer," they also
17 intend for that to include multiple computers, as it is
18 an open term. We're not trying to subtly kick out "a
19 network of computers." To the extent that the court

09:49AM

20 feels it's more prudent to include "or a network of
21 computers," I believe defendants could agree to that.
22 However, every step of this evidence, every step of the
23 briefing, every portion of the patents talk about how it
24 is providing authentication to a computer.

09:49AM

25 THE COURT: I understand your argument.

1 "Signature," however, is a term that does not denote what
2 the use of it is going to be. So, to build in this
3 limitation of "to a computer" requires some kind of
4 limiting language somewhere. I understand that a
09:50AM 5 principal use -- the principal use probably of this is as
6 a computer login; but is there anything anywhere that you
7 can point to that excludes other uses, especially since
8 isn't there a definition in the specification for this
9 term that does not include a limitation of access to a
09:50AM 10 computer?

11 MR. DIETRICH: I don't believe there is such a
12 definition, your Honor. To the extent that there is --

13 THE COURT: What I'm referring to is from the
14 '078 at column 3. The bottom of column 3, as I recall.

09:51AM 15 MR. NI: Yes, your Honor. It's lines 65
16 through 66.

17 MR. DIETRICH: Your Honor, I -- defendants
18 acknowledge this statement. I don't believe that this
19 does anything to state that access can be granted to
09:51AM 20 anything besides a computer. So, while it does say it's
21 designed to prevent unauthorized access, there's no
22 described embodiment beyond a computer. There's nothing
23 that can be pointed to. In fact, plaintiffs don't point
24 to anything in their briefing that could be used other
09:51AM 25 than this.

1 So, while plaintiffs -- or while defendants
2 acknowledge this statement, at the very top of that same
3 column, the first -- the first passage says (reading)
4 submission requires one or more transmissions intended
09:52AM 5 for authenticating access to a computer or network of
6 computers. So, I mean, every step of authentication of
7 access to this point has been limited to discussion of
8 computers. So, to the extent that the patent owner
9 didn't include the word "to a computer" I don't believe
09:52AM 10 is necessarily indicative of any additional environment
11 which authentication could be used in.

12 THE COURT: Well, what -- tell me what you're
13 concerned this signature will be used to read on if we
14 don't restrict it to a computer.

09:52AM 15 MR. DIETRICH: Well, effectively, your Honor,
16 I believe it would be to be using it in the way that
17 plaintiffs are currently asserting it, which is to reach
18 handheld devices.

19 THE COURT: Now, we've -- I've already
09:53AM 20 rejected your argument that a handheld device cannot be a
21 computer. Is that the only real dispute here?

22 MR. DIETRICH: I believe yes, your Honor; but
23 defendants respectfully are unwilling to concede on that
24 point. So --

09:53AM 25 THE COURT: I understand that.

1 MR. DIETRICH: -- defendants will preserve all
2 arguments. And I think one of those arguments is that
3 "to a computer" should be limited to computer devices,
4 excluding handheld devices.

09:53AM

5 THE COURT: All right. That clarifies the
6 argument for me. Thank you.

7 Mr. Egozi, anything separate on this term?

8 MR. EGOZI: No, your Honor.

9 THE COURT: All right. Mr. Ni?

09:53AM

10 MR. NI: Yes. Thank you, your Honor.

11 I think this court has made the point clear
12 that -- and defendants made the point clear that, you
13 know, their concern is the handheld device; and that has
14 been rejected by the term "computer." So, I think, as
15 counsel had said, they just weren't willing to concede on
16 leaving that term out of the construction.

09:54AM

17 THE COURT: Well, while you're up there, tell
18 me: Are you attempting to read this term "signature" as
19 precluding unauthorized access to anything other than a
20 computer the way you understand "computer"?

09:54AM

21 MR. NI: At this point plaintiffs have not
22 done so. Everything we've accused are -- do fall within,
23 you know, the court's preliminary construction for
24 "computer."

09:54AM

25 THE COURT: Okay.

1 MR. NI: But the term itself, as the court had
2 pointed out, in column 3:65 to 66 specifically defines
3 what a signature is; and, you know, we believe the
4 court's construction is consistent with that.

09:54AM

5 THE COURT: All right. Thank you, Mr. Ni.

6 MR. DIETRICH: Your Honor, moving on now, I
7 believe the next three terms can really be sort of
8 treated as part of the same discussion unless the court
9 has different feelings. I believe defendants' argument
10 and analysis is very similar for each of these. So, for
11 purposes of streamlining the argument, I believe we can
12 do so unless --

09:55AM

13 THE COURT: That's fine. The three
14 "wherein" -- the first three "wherein" terms we're
15 talking about.

09:55AM

16 MR. DIETRICH: That is correct, your Honor.

17 THE COURT: All right.

18 MR. DIETRICH: So, there's three key disputes
19 here between the parties. The first is -- will be
20 addressed very quickly, and that's the proper legal
21 standard for indefiniteness.

09:55AM

22 The second is whether plain and ordinary
23 meaning exists for grammatically flawed clauses.

24 And then the third is whether, in light of
25 those grammatical errors, any correction or

09:56AM

1 interpretation would be subject to reasonable debate.

2 So, the first point -- and again, defendants
3 will move through this quickly. It appears that
4 plaintiffs applied the improper standard in at least
09:56AM 5 their opening brief. I think the court is very clear on
6 what the proper standard is. We'll move on quickly.

7 THE COURT: I am familiar with the *Nautilus*
8 case.

9 MR. DIETRICH: I would imagine, your Honor.

09:56AM 10 With respect to plain and ordinary meaning,
11 plaintiffs can't and ultimately don't deny that these
12 clauses are grammatically flawed. We have here clauses
13 that on their face don't make sense, especially from a
14 facial standpoint but specifically within the realm of
09:56AM 15 patent claiming. So, plaintiff, nevertheless, suggests
16 that there's no construction necessary and that these
17 would be easily understood.

18 Setting aside defendants' argument that they
19 wouldn't be reasonably or easily understood given the
09:57AM 20 grammatical flaws, defendants feel that plaintiff's
21 alternative constructions expose just how unclear these
22 really are. So, what defendants have prepared here is a
23 reproduction of the claim language as it appears in the
24 claims in black; and defendants have then indicated in
09:57AM 25 red bolding the additional portions which would be added

1 by plaintiff's alternative constructions.

2 Looking at this, this is not what one of
3 ordinary skill in the art would read when simply reading
4 "wherein creating said signature using recorded signals
09:57AM 5 from a plurality of signal types." These are large,
6 extensive additions to the claim language which
7 plaintiffs ultimately are not including. I mean, there's
8 large citations to the specification in support of the
9 plain and ordinary meaning; but there's no citation to
09:58AM 10 any portion of the specification in support of these
11 alternative constructions anywhere in the briefing.

12 Effectively what plaintiffs are attempting to
13 do is to get the court to rectify certain grammatical
14 errors here. And again, you know, I don't believe the
09:58AM 15 court needs any briefing on when it is proper to include
16 revisions. However, defendants' position is that these
17 revisions are not simply changing grammatical -- you
18 know, misspellings or something that would be facially
19 obvious. These are broad, broad, bold inclusions of
09:59AM 20 additional language into the patents.

21 For example, taking a look at the first claim,
22 we have "wherein creating said signature based at least
23 in part upon at least a portion of said stored recording
24 comprises." I can think of at least three disputes in
09:59AM 25 there. Is it really "at least in part"? Is it "upon at

1 least a portion of said stored recording"? And then most
2 glaringly, the use of the open transition phrase
3 "comprises" in each one of these.

09:59AM

4 Again, defendants are unconvinced or
5 unpersuaded by plaintiff's use of these open transitional
6 phrases when it's equally plausible that the patent owner
7 might have intended to use semiclosed, "consisting
8 essentially of," or closed transition phrases,
9 "consisting of."

10:00AM

10 Again, defendants would respectfully argue
11 that any attempt to redraft these or assign any meaning
12 is not necessarily just to assign the proper meaning. It
13 would be preserving validity of what are otherwise
14 indefinite and poorly drafted claims.

10:00AM

15 THE COURT: You know, Mr. Dietrich, I
16 understand your arguments with the plaintiff's proposal;
17 but as I understand the court's function here, it is to
18 determine whether a person of ordinary skill in the art
19 would understand with reasonable certainty the scope of
20 this claim. And when I read claim 17 of the '725 patent,

10:00AM

21 what I think a person of ordinary skill would immediately
22 conclude is that the "wherein" clause is talking about
23 "wherein creating said signature uses recorded signals
24 from a plurality of signal types." It says "using" and I
25 understand that's awkward, but I don't think that a

10:01AM

1 person of ordinary skill would have the slightest doubt
2 that what is claimed there is the use of a plurality of
3 signal types, whereas the independent claim above talked
4 about signal types for at least one.

10:01AM

5 MR. DIETRICH: Yes, your Honor. And that may
6 be the case, and defendants are willing to acknowledge
7 that. However, I -- I suppose plain and ordinary meaning
8 could arguably be provided for some of these. However, I
9 don't know if it rises to the level of reasonable

10:02AM

10 certainty which is taught or proposed by the *Nautilus*
11 case. And, frankly, I believe, more glaringly --
12 understanding that the court is now headed in a direction
13 of plain and ordinary meaning, I think one of defendants'
14 primary concerns was modification of these terms in the
15 way proposed by plaintiffs.

10:02AM

16 THE COURT: Well, I do intend in the order, in
17 the ruling, to address what we think -- how we think this
18 would be read consistently with what I've told you.

10:02AM

19 MR. DIETRICH: Yes, your Honor. And I believe
20 defendants are comfortable with that. I -- or at least
21 resting on argument, having done -- having briefed these
22 issues in full and then presented our arguments to the
23 court.

10:03AM

24 THE COURT: That's fine. And I'm certainly
25 not asking you to waive your positions at all.

1 MR. DIETRICH: Yes, your Honor.

2 THE COURT: Okay. I do understand your
3 concerns, though.

10:03AM

4 MR. DIETRICH: And I will address the final
5 "wherein" clause separately. I understand Mr. Ni might
6 have some comments here.

7 THE COURT: Okay. Mr. Egozi, anything on the
8 first three "wherein" clauses?

9 MR. EGOZI: No, your Honor.

10:03AM

10 THE COURT: Okay. Thank you.

11 MR. NI: Thank you, your Honor. We appreciate
12 the court's understanding of the term.

10:03AM

13 While we're not certain at this point what the
14 court intends to state in their final opinion on what the
15 plain and ordinary meaning would mean, I think we do
16 propose that what we had set forth to articulate the
17 claims based on sort of the antecedent basis and based on
18 what is in the entirety of the claims are rather
19 representative of what we hope the court would intend to
20 put in their opinion on the definition.

10:04AM

21 THE COURT: I think that what you've proposed
22 includes a fair amount of rewriting of the claim --

23 MR. NI: Okay.

10:04AM

24 THE COURT: -- that I don't think is within
25 the proper purview of the court on claim construction.

1 Why should we interpret -- let's focus on
2 claim 17.

3 MR. NI: Sure.

10:04AM

4 THE COURT: Why does that introduce any other
5 limitation to claim 15 than "using the signals from a
6 plurality of signal types" as opposed to "at least one"
7 or "at least" -- well, it says "for at least one
8 user-selected device."

10:05AM

9 MR. NI: I think the interpretation we had in
10 that -- in that claim 17 was just based on -- based on a
11 viewing of claim 15 in its entirety. I do not -- I don't
12 disagree with the fact that the claim could be simplified
13 by just the term "using" as well.

14 THE COURT: Okay.

10:05AM

15 MR. NI: If the -- I think the --

16 THE COURT: And I may have -- I'm looking now.
17 I may have -- let me just say I may have tied it to the
18 wrong part of claim 15. I don't know. But in any event,
19 what I'm thinking the limitation it introduces is the
20 "plurality of signal types."

10:05AM

21 MR. NI: Right. Sorry. Yeah, I think I was
22 going the same direction there, your Honor.

23 So, the portion of claim 15 was actually
24 talking about creating a signature "based at least in
25 part upon at least a portion of said stored recording."

10:06AM

1 So, because we believe the dependent portion on claim 17
2 follows that limitation of claim 15, that was the way we
3 had interpreted someone of ordinary skill in the art
4 would read that claim 17 limitation.

10:06AM

5 THE COURT: Well, obviously it has to include
6 all of the limitations of claim 15.

7 MR. NI: That's correct, your Honor.

8 THE COURT: But in any event -- all right. I
9 understand your argument.

10:06AM

10 MR. NI: Okay. And I think our arguments are
11 very similar for the other "wherein" terms as well.

12 THE COURT: Okay.

13 MR. NI: Except for the final term.

14 THE COURT: Then we can move to the last
15 "wherein" clause.

10:06AM

16 MR. NI: Okay. So, your Honor, I'll stay up
17 here; and I'll go ahead and ask a question about the last
18 "wherein" clause. So, it's unclear from the court's
19 preliminary construction what the clarification of the

10:07AM

20 claim language means when you're suggesting that the
21 recording literally comprises multiple input devices
22 rather than signals obtained from those devices. Is that
23 suggesting that, you know, the recordings are not
24 actually signals, that they're -- actually I'm not quite

10:07AM

25 sure where the court is going with that construction

1 language.

2 THE COURT: Well, I'm trying to give effect to
3 the claim as written. And I understand that that may be
4 a demanding limitation, but that's what it says.

10:08AM

5 MR. NI: So, what the court is saying is is
6 recording literally is a number of physical and multiple
7 input devices?

8 THE COURT: Yes.

10:08AM

9 MR. NI: Okay. All right. Thank you, your
10 Honor.

11 MR. DIETRICH: Your Honor -- and I apologize
12 profusely for jumping around here. I would like to go
13 back just very quickly, if we could, to the three
14 "wherein" terms on the board here.

10:08AM

15 THE COURT: Sure.

16 MR. DIETRICH: So, the first one we've
17 addressed, claim 17.

10:08AM

18 The second one, however, is claim 12, "wherein
19 passively terminating said recording." I believe --

20 while a plain and ordinary meaning might be able to be
21 assigned to 17 -- obviously defendants reserve their
22 objection to that, but it doesn't appear that the same
23 could be said of claim 12. For example, it appears that
24 claim 12 is drastically changing what was intended by

10:09AM

25 dependent claim -- or independent claim 10. In fact,

1 it -- ultimately I -- I'm just unclear how to read this.
2 And I don't believe we necessarily need to get into the
3 depths of each one of these; but I will, I suppose,
4 properly reserve our objection to the plain and ordinary
10:09AM 5 meaning for each of these claims. So, I'll just leave it
6 at that unless the court has additional questions.

7 THE COURT: Well, I do understand that and
8 it's hard to give a succinct preliminary construction of
9 a claim that -- when we're going to expand upon what the
10:10AM 10 plain and ordinary meaning is in the ruling; and I -- so,
11 I understand your uncertainty about it.

12 MR. DIETRICH: Yes, your Honor.

13 THE COURT: And that's --

14 MR. DIETRICH: And defendants acknowledge and
10:10AM 15 are willing to move on, your Honor.

16 THE COURT: That's fine. I'm not trying to
17 cut you off, but I will say that we intend to say more
18 about it than just "plain and ordinary."

19 MR. DIETRICH: Yes, your Honor.

10:10AM 20 THE COURT: Okay.

21 MR. DIETRICH: With respect to the final
22 "wherein" clause here, we have "wherein said recording
23 comprises a plurality of user-selected devices."

24 Effectively, defendants' construction is that this is
10:10AM 25 indefinite. However, in the alternative, defendants are

1 willing to move forward with the proposed preliminary
2 construction that this should be interpreted literally.
3 However, I will touch on a few points with respect to
4 indefiniteness.

10:11AM

5 Aside from the arguments that we've already
6 briefed with respect to the previous "wherein" clauses,
7 there's an additional three arguments I'd like to address
8 here with respect to this particular clause.

10:11AM

9 First is that there appears to be a lack of
10 any proper antecedent basis for the term "recording."

11 The second, again, is whether plain and
12 ordinary meaning can exist for a grammatically flawed
13 clause.

10:11AM

14 And then the final is whether this clause
15 should be interpreted literally.

16 What we have here on the board is a
17 reproduction of independent method claim, including
18 various actions, various steps. We've also reproduced
19 dependent claim 10 which includes the disputed clause.

10:11AM

20 As you look here, there's two independent and
21 separate acts of recording that are identified in the
22 body of the independent claim; and they don't appear to
23 be related because with the first it is "recording input
24 data at at least one signal type." The second is

10:12AM

25 "affords recording a plurality of signal types." These

1 are not the same step.

2 So, looking down, it doesn't appear that there
3 can be assigned some proper antecedent basis. Which --
4 which of these recordings are we drawing this to? Which
5 step includes "wherein said recording comprises a
6 plurality of user-selected devices"? It's simply --
7 we're left to guess, essentially. And certainly I don't
8 believe that this would rise to the level of reasonable
9 certainty that the courts demand.

10 Again, I don't believe plaintiff can dispute
11 that this clause as written is grammatically flawed and
12 nonsensical. Literally the phrase is "wherein said
13 recording comprises a plurality of user-selected
14 devices." In other words, it's "wherein said method step
15 comprises a plurality of apparatuses." Effectively this
16 is the equivalent of saying "wherein said sitting
17 comprises a plurality of chairs." It's nonsensical.
18 It's gibberish.

19 Plaintiff's alternative construction here
20 doesn't clarify this here, and it still -- it relies on
21 the use of "recording" as a noun, as a physical object
22 which is capable of containing other objects or other
23 information. So, by adding "wherein said recording
24 comprises signal types from a plurality of user-selected
25 devices," all we've essentially done is double down on

1 the indefiniteness. It's saying "wherein said sitting
2 comprises cushions from a plurality of chairs."
3 Effectively even the alternative construction proposed by
4 plaintiffs add no more specificity or no more certainty
5 to this disputed term.

10:13AM

6 And then very briefly, your Honor, to the
7 extent that defendants' proposal is not accepted,
8 defendants alternatively argue that the court should
9 construe this term literally as it's proposed in the
10 preliminary claim constructions, understanding that that
11 would be a demanding task.

10:14AM

12 THE COURT: All right. Thank you,
13 Mr. Dietrich.

14 MR. DIETRICH: Yes, your Honor.

10:14AM

15 THE COURT: Mr. Egozi?

16 MR. EGOZI: Thank you. Nothing further, your
17 Honor.

18 THE COURT: All right. Mr. Ni?

19 MR. NI: Nothing further, your Honor.

10:14AM

20 And I think we'll just look to see the court's
21 final construction. We're not going to -- you know,
22 while we -- sorry, your Honor. While we do think there
23 is a possible way of, you know, rehabilitating the
24 literal claim language on the last claim, you know, it's
25 not -- we're not asking the court to do that if the court

10:14AM

1 is inclined to construe it actually literally.

2 THE COURT: What do you say to the antecedent
3 basis question that Mr. Dietrich just raised about
4 "recording"?

10:15AM

5 MR. NI: I guess I don't see the concern with
6 that. The term "recording" was -- I thought the term
7 "recording" was present in the claim.

10:15AM

8 THE COURT: It is present in two places, two
9 limitations of claim 9, the second limitation and the
10 fourth limitation, I guess.

11 MR. NI: I think we're willing to concede
12 that, you know, under the literal definition of the
13 claim and -- you know, this is, I mean, not a claim that
14 the plaintiffs would go forward on.

10:16AM

15 THE COURT: Okay. I understand what you're
16 saying.

17 MR. NI: We're not going to be impractical
18 about that.

10:16AM

19 THE COURT: Very good. Are there other
20 arguments that any party wants to offer on any of these
21 claims?

22 MR. NI: No, your Honor. Thank you.

23 MR. DIETRICH: Not at this time, your Honor.

24 MR. EGOZI: No, your Honor.

10:16AM

25 THE COURT: All right. Well, gentlemen, I

1 appreciate your arguments. They have been very helpful,
2 and I will endeavor to get a claim construction ruling
3 out promptly. So, thank you; and we're adjourned.

4 (Proceedings adjourned, 10:20 a.m.)

5
6
7 COURT REPORTER'S CERTIFICATION

8 I HEREBY CERTIFY THAT ON THIS DATE, MAY 25,
9 2016, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
10 RECORD OF PROCEEDINGS.

11

12

13

/s/

TONYA JACKSON, RPR-CRR

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